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Supreme Court of the United States

OCTOBER TERM, 1932.

SAM HAWKS, J. F. McKEEL and LEW WENTZ Constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

Petitioners,

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

Respondents.

No. 147

BRIEF OF RESPONDENTS

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Petitioners,

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

Respondents.

No. 147

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Respondents, citizens and residents of Illinois, brought this suit to obtain protection by writ of injunction against the petitioners, and all citizens of the State of Oklahoma using the Purcell-Lexington toll bridge, interfering with the respondents in the operation of said toll bridge and in the col-

lection of tolls from persons using said toll bridge, and using said bridge without the payment of tolls.

The bridge crosses the South Canadian River at Purcell, Oklahoma. The river is the dividing line between McClain and Cleveland Counties. The bridge was constructed under franchises to operate the same as a toll bridge, granted by those counties to Dorset Carter and Tom Halsell on April 22, 1911, and May 16, 1911. Each franchise provided:

"That the grants herein made shall be perpetual and subject only to such limitations as is by law now, or may be hereafter provided,"

and also contained a provision that the same might be transferred to any individual, or corporation organized under the laws of the State of Oklahoma. On May 18, 1911, Purcell-Lexington Toll Bridge Company was incorporated under the laws of Oklahoma, and the franchises were thereafter assigned to that corporation. The corporation completed the bridge and operated it until April 2, 1931, when the bridge and franchises were assigned to Walling, Hamill and Carter. Prior to the filing of the suit, Carter conveyed his interest to Hamill and Walling. The complaint named as defendants the three members of the Highway Commission of Oklahoma, the Attorney General, the County Attorneys of the two counties, and six individuals, three of whom resided in McClain County and three in Cleveland County. The six individual

defendants were alleged to be representative of the citizens of the State of Oklahoma who have occasion to and will use said bridge, and that said defendants and other citizens of the State of Oklahoma having occasion to use said bridge, will, unless enjoined, use the same without the payment of tolls, and that complainants would be compelled to resort to force to prevent the unlawful use of the bridge, or would be compelled to prosecute a multiplicity of suits for that purpose; that the citizens of the State who use and will continue to use said bridge are so numerous that it is impossible to make all of them parties.

The bill of complaint alleged that the defendants and each of them, were contending that the right to operate said toll bridge and to collect tolls from persons using the same would terminate with the corporate existence of the Purcell-Lexington Toll Bridge Company on the 18th day of May, 1931, and that said bridge would at that time become a free bridge and a part of the State Highway system of the State of Oklahoma, with the right and privilege of citizens of the State of Oklahoma to use the same as a public highway without the payment of tolls; that the franchises to operate the bridge were granted to individuals and not to the corporation, and such franchises continue in full force and effect in accordance with their terms; that the right to continue in possession and operation of the bridge and take tolls was in the complain-

ants; that the three members of the State Highway Commission would, unless restrained by the court, take charge of the bridge as a part of the highway system of the State of Oklahoma, in violation of the complainants' rights under the franchises, and deprive the complainants of their property for the use and benefit of the traveling public, without compensation, and thus deprive complainants of their right to continue in possession of the bridge and to collect tolls from persons using the same; that the Attorney General of the State had threatened to institute proceedings against complainants to deprive them of their rights; that if complainants collected tolls after May 18, 1931, they would be subject to a forfeiture of $25.00 to each person from whom toll was collected, and would further be guilty of obstructing the public highway and subject to a fine of $100.00 for each offense; that the County Attorney of each of said counties had threatened similar proceedings against the complainants; that because of the threatened prosecutions, both civil and criminal, the invasion of complainants' rights and the taking of their property without right and without compensation, they have no adequate remedy at law; that they will be subjected to a multiplicity of suits by the defendants and by the citizens of the State having occasion to use said bridge. (R. 3-13).

A temporary restraining order was granted on May 1, 1931, and a hearing on the application for a temporary in-

junction was set for the 23rd day of May, 1931, and thereafter continued to May 25, 1931 (R. 27, 55, 56). On May 25th the cause came on regularly for hearing on the application for a temporary injunction, and evidence was introduced in support of said application (R. 55-60). After the introduction of the evidence on the application for a temporary injunction, the defendants filed motions to dismiss the bill, and by agreement of counsel notice of the hearing on the motions to dismiss was waived, and the court proceeded to hear said motions immediately (R. 61).

The two County Attorneys and the individual defendants moved to dismiss the bill on the ground that the bill did not state facts sufficient to entitle the plaintiffs to relief. The Attorney General and the members of the Highway Commission moved to dismiss on the ground that the bill did not state facts sufficient to entitle the plaintiffs to relief, and also on the ground that the suit was one against the State (R. 31-32). On consideration of the motions to dismiss, the court entered an order sustaining said motions "on the ground that the facts stated do not entitle the plaintiffs to relief in equity" (R. 41). The complainants appealed to the Circuit Court of Appeals, and an opinion was rendered by that court reversing the judgment of the District Court (R. 81). Certiorari was granted by this Court on October 10, 1932. The questions presented are: Whether the secondary franchises

for the operation of the toll bridge expired with the expiration of the corporate life of Purcell-Lexington Toll Bridge Company, and whether the suit as against the members of the Highway Commission and the Attorney General is one against the State of Oklahoma.

The respondents contend as follows:

1. The secondary franchises for the operation of the toll bridge were granted to individuals, and were not limited, as to duration, by the life of the corporate assignee.

2. The granting of a franchise to operate a toll bridge is not limited to bridge corporations organized pursuant to Section 5366, Compiled Oklahoma Statutes, 1921, and the County Commissioners were fully authorized to grant such franchises to the individual grantees.

3. In the absence of constitutional or legislative restrictions, a secondary franchise may be granted to all persons alike, whether natural or artificial.

4. A secondary franchise to operate a toll bridge granted to a bridge corporation, is wholly independent of the corporate existence of such bridge corporation.

5. The franchises authorized the grantees and their assigns to operate the toll bridge until such franchises should

be revoked by the Legislature, or the property should be acquired by purchase or condemnation. Such franchises are not violative of the perpetuity clause of the Oklahoma Constitution.

6. The suit is not against the State of Oklahoma.

ARGUMENT

The secondary franchises for the operation of the toll bridge were granted to individuals, and were not limited, as to duration, by the life of the corporate assignee.

The bill of complaint alleged that the secondary franchises were granted to individuals who commenced the construction of the bridge, and that such individuals thereafter conveyed the same to Purcell-Lexington Toll Bridge Company, an Oklahoma corporation (R. 4-8). The franchises, which were attached to the bill, show that they were granted to Dorset Carter and Tom Halsell and their assigns (R. 13-17). In such circumstances, it is well settled that the duration of such secondary franchises is independent of and not influenced by the corporate existence of Purcell-Lexington Toll Bridge Company.

Grove Bridge Company v. *State,* 133 Okla. 115, 271 Pac. 846.

The District Court held that the secondary franchises were granted to Halsell and Carter for the benefit of Purcell-Lexington Toll Bridge Company, and that such franchises were limited to the life of the corporation. That conclusion was contrary to the allegations of the bill. The petitioners contend that the franchises attached to and made a part of the bill show that the franchises were granted to the individuals for the use and benefit of the bridge corporation which was thereafter organized. They call attention to the use of the words "bridge company" in the franchises as supporting that contention. It has been held that "company in its primary sense means an association of a number of individuals for the purpose of carrying on a legitimate business—a number of persons united for the same purpose or in a joint concern as a company of merchants," and that the word "company" includes individuals.

Lowther v. *Bridgeman* (W. Va.), 50 S. E. 410, 411;
Singer Mfg. Company v. *Wright*, 33 Fed. 121, 127.

The other provisions of the franchises, which have been referred to by counsel for petitioners as indicating that said franchises were granted for the benefit of the corporation, are just as appropriate in franchises granted to individuals as in those granted to corporations. In the last paragraph of the franchise it is provided that the grantees may transfer all of the rights and privileges therein granted unto any in-

dividual or corporation organized under the laws of the State of Oklahoma. That clause clearly shows that the grant was to the individual grantees with authority to assign the same either to individuals or to an Oklahoma corporation.

Counsel for the petitioners further contend that the evidence in the case shows that the secondary franchises were granted to the individuals for the benefit of the toll bridge corporation. The decree in this case was entered on motions to dismiss the bill "on the ground that the facts stated do not entitle the plaintiffs to relief in equity" (R. 41). At Pages 55-70 of the Record appears certain testimony which has been referred to by counsel for the petitioners. That testimony was taken in connection with complainants' application for a temporary injunction (R. 55-60). There was no hearing on the merits of the case, and the evidence which was introduced was only applicable to the application for a temporary injunction. Before the court determined the application for a temporary injunction, motions to dismiss the bill were filed and argued. Thereafter the court denied the application for a temporary injunction, and at the same time sustained the motions to dismiss "on the ground that the facts stated do not entitle the plaintiff to relief in equity." The complainants appealed from the order dismissing the bill. The evidence appearing in the transcript cannot be considered in determining whether the motions to dismiss should have been

sustained, as motions to dismiss because of the insufficiency of the allegations of the bill must be determined by the allegations of the bill and the attached exhibits.

Stromberg Motor Devices Co. v. *Holley Brothers*, 260 Fed. 220;
Krouse v. *Bevard Tannin Co.*, 249 Fed. 538;
Old Dominion Trust Co. v. *First National Bank*, 252 Fed. 613;
Badger v. *Arnold*, 282 Fed. 115.

The granting of a franchise to operate a toll bridge is not limited to bridge corporations organized pursuant to Section 5366, Compiled Oklahoma Statutes, 1921.

As the franchises under consideration were granted to individuals, it is necessary to determine whether there was, at the time of the granting of the secondary franchises, legal authority for granting such secondary franchises. It is conceded that the operation of a toll bridge is a business which requires a secondary franchise. If the Oklahoma Statutes limit the ownership and operation of toll bridges to bridge corporations organized pursuant to Section 5366, C. O. S. 1921, it necessarily follows that such secondary franchises cannot be granted to individuals as original grantees, and franchises originally granted to bridge corporations cannot be assigned to individuals. It is conceded by counsel for petitioners that authority to grant toll bridge franchises has

been delegated by the State to the Board of County Commissioners of the county in which the bridge is situated. They contend, however, that such authority is limited to bridge corporations organized under Section 5366. In the absence of constitutional or legislative restrictions, a secondary franchise may be granted to all persons alike, whether natural or artificial.

> *Lowther* v. *Bridgeman* (W. Va.), 50 S. E. 410, 411;
> *Watson* v. *Railroad Company,* 49 W. Va. 539, 39 S. E. 193;
> *Memphis, etc., Ry. Company* v. *Railroad Commissioners,* 112 U. S. 609, 619.

There is no constitutional or statutory inhibition in Oklahoma against the granting of a franchise to an individual for the purpose of owning and operating a toll bridge. It is not even contended by counsel for petitioners that Sections 5366 and 5367, C. O. S. 1921, contain a grant of authority authorizing the Board of County Commissioners to grant a secondary franchise. Section 5366 specifies what shall be contained in the articles of incorporation of a bridge corporation in order to entitle such corporation to receive a primary franchise from the State of Oklahoma. Said section contains no grant of a secondary franchise and no grant of authority to the Board of County Commissioners to grant such secondary franchise. A corporation having received a primary fran-

chise under said section, would have no authority to operate a toll bridge.

Section 5367, C. O. S. 1921, provides:

> "No such corporation shall construct or take tolls on a bridge until authority is granted therefor by the board of county commissioners of the county or counties in which it is to be located."

There is no delegation of authority to the Board of County Commissioners to grant a secondary franchise contained in that section, but it is merely a limitation on the power of a corporation created under Section 5366. By said section, the Legislature made it plain that the corporate charter granted under Section 5366 was not sufficient to authorize a bridge corporation to operate a toll bridge. The Supreme Court of Oklahoma, in *Postal Bridge Company* v. *State,* 139 Okla. 225, 227, 282 Pac. 462, 464, held that Section 5367 was not a grant of power, in the following language:

> "Defendant in error contends that Section 5367 is the only statute in Oklahoma granting authority for any person, firm or corporation to own and operate a toll bridge, and that said section limits that authority to toll bridge corporations incorporated as provided by Section 5366. This section is not a grant of power from the Legislature, but is a limitation upon a toll bridge corporation incorporated under Section 5366, *supra,* provided that it can-

not operate without it secures a secondary franchise from the county commissioners of the county or counties in which it is located."

It is necessary, therefore, to look further for the purpose of determining the authority of the Board of County Commissioners to grant franchises to operate a toll bridge. That authority is recognized in *Postal Bridge Company* v. *State, supra,* and it was there determined that the authority was not delegated in Sections 5366 and 5367.

The power of the Board of County Commissioners to grant franchises for the construction and operation of toll bridges arises out of the authority to construct and repair bridges and to open, lay out and vacate highways, granted by Section 1600 R. L. 1910, Section 5793, C. O. S. 1921, and the general control and supervision of the Board of County Commissioners over bridges more than fifteen feet wide, conferred by Section 7581, R. L. 1910. The power to grant a franchise is based upon the right of the authority granting the franchise to control the property over which the franchise is granted, or which is affected by it. This Court has recognized that a general statute delegating authority to control and supervise public roads is sufficient authority for the exercise of the right to grant a secondary franchise affecting such roads.

Owensboro v. *Cumberland Telephone & Telegraph Co.,* 230 U. S. 58, 67, 68.

In *Irvine Toll Bridge Company* v. *Estill County,* 210 Ky. 170, 275 S. W. 634, 636, it was held that a similar statute of the State of Kentucky was sufficient authority to authorize the granting of a franchise for the construction and operation of a toll bridge. Nowhere can there be found any inhibition against an individual owning and operating a toll bridge. Section 5367 recognizes that authority has been delegated to the county commissioners to grant such franchises, and limits the power of a bridge corporation to engage in business until it has procured such secondary franchise. Section 10076, C. O. S. 1921, recognizes the jurisdiction of the Board of County Commissioners over toll bridges, and also recognizes the right of an individual to own and operate a toll bridge. That section authorizes the Board of County Commissioners to acquire by purchase or by condemnation proceedings all the rights and properties of whatsoever character, "of any person, firm or corporation, used for and in the operation of any toll bridge in said county." Section 5625 and 5636, C. O. S. 1921, appearing at pages 57 and 61 of petitioners' brief, also recognizes the authority of the county commissioners to grant such franchises, and also recognizes the right of an individual to own and operate a toll bridge. By Section 5636 it is provided:

> "When a wagon, turnpike or plank road is constructed, owned or operated by any natural person, this article is

applicable to such person in like manner as it is applicable to corporations."

Counsel for petitioners contend that those provisions have application only to toll roads and have no application to a toll bridge. We contend that a bridge is a roadway, and when a charge is made for the use of the same, it constitutes a turnpike. The Supreme Court of Oklahoma took that view of the matter in the Postal Bridge Company case, in which it was said (282 Pac. 465):

> "The question of a right of an individual to own and operate a toll road *which included the right to own and operate toll bridges* as provided in Section 5627, *supra*, was before this court in *Gibson* v. *Rogers County ex rel. Hall, County Attorney, et al.*, 75 Okla. 51, 181 Pac. 720. * * * Under this section of the statute, an individual is specifically authorized to own and operate a toll bridge upon procuring a proper franchise from the Board of County Commissioners in the county in which said toll bridge is owned and operated."

In the case at bar, one end of the bridge stands on privately owned property and, at the other end, a private road leads from the bridge to the public street (R. 5, 6, 8). The bridge, therefore, was not only a toll bridge but also a toll road.

The said case of *Postal Bridge Company* v. *State, supra,* is a definite announcement of the highest court of the State

on the authority of the Board of County Commissioners to grant a franchise to operate a toll bridge to an individual. The bridge involved in that case was not a connecting link between parts of a toll road, but was a toll bridge constructed by a corporation organized under the provisions of Section 5366, C. O. S. 1921. The land at each end of the bridge belonged to the owners of the bridge, as in the case at bar. A secondary franchise was granted to the bridge corporation by the Board of County Commissioners of Blaine County. Thereafter the bridge corporation assigned the secondary franchise to Postal Bridge Company, a trust. The State contended that the secondary franchise to operate the toll bridge could not be assigned to Postal Bridge Company, a Trust, because a toll bridge could only be owned and operated by a corporation organized under Section 5366. The State further contended that the only authority for owning and operating a toll bridge was contained in Sections 5366 and 5367, and that an individual could not own and operate a toll bridge. The court held to the contrary, and specifically recognized the right of any person, firm or corporation to own and operate a toll bridge, and to receive a secondary franchise from the Board of County Commissioners. The court said:

> "Under this section of the statute an individual is specifically authorized to own and operate a toll bridge upon procuring a proper franchise from the board of county

commissioners in the county in which said toll bridge is owned and operated.

"In addition to this, Section 10076, C. O. S. 1921, authorizes the county commissioners to acquire by purchase, by agreement with the owner or owners thereof, or by condemnation proceedings, all the rights and properties of whatsoever character of any person, firm, or corporation, used for and in the operation of any toll bridge in said county. This specifically recognizes the right of any person, firm or corporation to own and operate a toll bridge. We are therefore of the opinion that an express trust was authorized under the statutes of Oklahoma to own and operate a toll bridge in this State."

In that case, the original franchise was granted to a bridge corporation, and was assigned by it to individuals. In the case at bar, the original franchise was granted to individuals and assigned to a bridge corporation. The principle involved is the same. No individual, firm or corporation can operate a toll bridge without a franchise. If franchises cannot be originally granted to individuals and can only be granted to bridge corporations, there would be no authority for an assignment of a franchise from a bridge corporation to an individual. If an assignment of such franchise may be made to an individual, it necessarily follows that a franchise could be originally granted to an individual.

We submit that the highest court of the State has decided that an individual may own and operate a toll bridge, and

that a franchise to operate the same may be granted by the Board of County Commissioners to an individual, and that such franchises are assignable. Hence, the County Commissioners of McClain and Cleveland Counties were authorized to grant the franchises to Halsell and Carter, and the same were assignable to Purcell-Lexington Toll Bridge Company and by that corporation to the complainants. The duration of such franchises is determined by the original franchises granted to Halsell and Carter, and is not limited in any way by the corporate life of Purcell-Lexington Toll Bridge Company.

Counsel for petitioners contend that the franchises do not recite that conditions preliminary to the granting of secondary franchises were performed. The franchises having been granted by the proper authorities and being regular on their faces, it is presumed that all preliminary conditions required by law were performed.

Oklahoma City v. *Derr*, 109 Okla. 192, 235 Pac. 218;

Newman v. *Warren-Quinlan Asphalt Company*, 177 Pac. 375;

Crawford v. *Cassity*, 78 Okla. 261, 190 Pac. 410;

Board of Commissioners v. *City of Fort Collins*, 68 Colo. 364, 189 Pac. 929;

Fabric Fire Hose Co. v. *Town of Caddo*, 59 Okla. 89, 158 Pac. 350.

The period for which a secondary franchise may be granted to a corporation, organized pursuant to Section 5366, is not limited to twenty years.

If it be conceded that the franchises herein were granted to Carter and Halsell for the benefit of the toll bridge corporation which was thereafter organized. the duration of such secondary franchises was not limited to the corporate life of Purcell-Lexington Toll Bridge Company. The secondary franchise to operate the toll bridge is wholly independent of the corporate existence of the toll bridge corporation.

Grove Bridge Company v. *State*, 133 Okla. 115, 271 Pac. 846;

City of Owensboro v. *Cumberland Telephone & Telegraph Company*, 230 U. S. 58;

Detroit Citizens Street Railway Co. v. *City of Detroit*, 64 Fed. 628;;

Grand Rapids Bridge Co. v. *Prange*, 35 Mich. 400;

Old Colony Trust Co. v. *City of Omaha*, 230 U. S. 101;

State v. *Des Moines Street Railway Co.*, 159 Ia. 259, 140 N. W. 437;

Calder v. *Michigan*, 218 U. S. 591, 600;

Detroit v. *Detroit Citizens Street Railway Co.*, 184 U. S. 368, 394, 395;

Vicksburg v. *Vicksburg Waterworks Co.*, 202 U. S. 453, 464;

Minneapolis v. *Street Railway Co.*, 215 U. S. 417, 430.

The fact that such franchises are assignable, as held in *Postal Bridge Co.* v. *State, supra,* is a further recognition that such franchises are independent of the primary corporate franchise.

State ex rel. v. *Scott County Road Company,* 207 Mo. 54 (S. C.), 215 U. S. 336, has been cited as authority for the contention that the franchise to collect tolls is limited in duration to the life of the corporation In that case the same act of the Legislature which incorporated the company granted the right to take tolls and limited such right to a period of fifty years.

In *Rockwith* v. *State Road Bridge Company* (Mich.), 108 N. W. 785, the secondary franchise was granted to the corporation and not to its successors and assigns. The court held that such fact distinguished the case from *Detroit Street Railway Company* v. *Detroit, supra.*

The distinction between such cases and the case at bar is well stated in *City of Owensboro* v. *Cumberland Telephone & Telegraph Company,* 230 U. S. 58, in which it was said:

> "The grant was to the particular company by name and was not to its assigns or successors. This court likened such a grant to a grant at common law to a natural person without words of restriction, which, said the court, 'creates only an estate for the life of the grantee;

for he can hold the property no longer than he himself exists.' The grant here involved was to the corporate grantee, its assigns and successors, and falls under the principle of the cases cited above."

In the case at bar the franchises were granted to the grantees and their successors and assigns; the primary corporate franchise was granted by the State, and the secondary franchises to collect tolls were granted by the county commissioners. The term of the secondary franchises is therefore not controlled by the duration of the corporate franchise.

The franchises are not violative of the perpetuity clause of the Oklahoma Constitution.

As these franchises were not limited in duration by the corporate life of Purcell-Lexington Toll Bridge Company, the expiration of the charter of that corporation had no effect on the secondary franchises. Those franchises were assigned to the complainants prior to the expiration of the corporate charter. However, it is necessary to determine the duration of such secondary franchises in order to determine whether such secondary franchises had expired when this suit was brought. There is no question involved as to the extension of the secondary franchises. The respondents do not contend that the secondary franchises were extended, but do contend that the original grants made to Halsell and Carter, and owned by the complainants at the time this suit was brought,

had not expired. Each of the franchises contain the following language:

"That the grants herein made shall be perpetual and subject only to such limitations as is by law now, or may be hereafter provided."

It is generally recognized that a secondary franchise, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general laws of the State, is a grant of a property right in perpetuity.

Owensboro v. *Cumberland Telephone and Telegraph Co.*, 230 U. S. 58, 65;
Detroit v. *Detroit Citizens Street Railway Co.*, 184 U. S. 368, 395;
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100.

The Statutes of Oklahoma authorizing boards of county commissioners to grant toll bridge franchises contain no limitation as to the period for which such franchises may be granted. In the general law of the State, we find provisions which are more effective and afford a greater degree of protection to the public than if a definite period had been stated in the franchises. Section 10076, C. O. S. 1921, authorizes the board of county commissioners, by purchase or by condemnation proceedings, to acquire all of the rights and properties of any person, firm, or corporation, used for and in the operation of any toll bridge in the county. In Chapter 256,

Laws of 1925, the Legislature authorized the State Highway Commission to acquire toll bridges, and provided a limit of compensation. Neither statute provided any compensation for the franchise. If a franchise for a specified term had been granted and an effort had been made to take the property by condemnation proceedings, it would have been necessary to compensate the owner for the unexpired period of the franchise. The franchises in the instant case have been subject to termination at all times since the construction of the bridge by condemnation of the physical property. However, the most recent limitation is found in Section 47 of Article IX of the Oklahoma Constitution, and is as follows:

> "The Legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise now existing and subject to be altered, amended, annulled, revoked, or repealed at the time of the adoption of this Constitution, or any that may be hereafter created, whenever in its opinion it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the incorporators."

Counsel for the petitioners contend that the above constitutional provision has no application to secondary franchises, but only applies to the primary franchise of a corporation. In support of that contention they quote from a concurring opinion of Justice Lester in *City of Okmulgee* v. *Okmulgee Gas Company*, 282 Pac. 653. The statement contained

therein was not a part of the opinion of the court. This question was directly involved in *Oklahoma City* v. *Shields*, 22 Okla. 265, 100 Pac. 559, and the court held that said section was applicable to secondary franchises. That case involved a secondary franchise granted by a municipality as distinguished from the corporate franchise, and the court, in holding that said constitutional provision included franchises, said (100 Pac. 572):

> "The Constitutional Convention, desiring to preserve the reservations in Section 932, Wilson's Rev. & Ann. St. 1903, *supra*, incorporated said section in the Constitution, and specifically included franchises. * * * These municipal subdivisions in their infancy, by an overdesire to build and grow, frequently through their municipal government ill advisedly grant away valuable franchises, shackling and burdening future generations And were it not for the wise provisions in the economy of our law, reserving the power to amend and repeal, and to impose additional burdens upon franchises and these public privileges, the officers of such municipalities, in their overdesire to build, grow, and develop, might unwisely burden the future to develop the present
>
> "No municipal body has the moral right to grant away the privileges and rights of future generations It is an unwise and unfatherly parent that makes obligations that will bind and shackle and dwarf his children, and bring them to grief and misfortune It is an unwise municipal government that would seek to shackle and to bind the administrations of the coming years And it is wise and

salutary in the economy of state building that such powers have been reserved to the Legislature to have the paramount supervision and control."

Under the authority contained in Section 47 of Article IX of the Constitution, the Legislature of the State has the power to repeal and cancel secondary franchises of the complainants at any time. The franchises are not perpetual, but are terminable at the pleasure of the Legislature That character of franchise, without specification of the period of duration, is not unusual in other states and is rather common in the State of Oklahoma. All railroad, oil pipe, express, telephone and telegraph companies operating in this State operate under similar provisions, reservations and franchises by virtue of Section 20 of Article IX of the Constitution. That provision of the Constitution is a grant of authority, which, when accepted by the utilities therein mentioned, is a franchise, and continues until such time as the Legislature, acting under the provisions of Section 47 of Article IX, shall change or repeal the franchise. In the instant case the franchises were to continue until such time as the Legislature should repeal them or the physical properties should be taken by condemnation proceedings. The State has taken no steps to repeal such franchises, and no attempt has been made to acquire the same by condemnation. Hence, such franchises are still in force. Counsel for petitioners contend that a franchise of

this character is a perpetuity and violates Section 32 of Article II of the Oklahoma Constitution, which declares that perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed. In support of that contention they city *City of Okmulgee* v. *Okmulgee Gas Company,* 140 Okla. 88, 282 Pac. 640, and other similar cases. In those cases the court had under consideration franchises for the furnishing of power, light, heat, gas, electricity or water as a public utility in any city or town of this State. Such franchises were granted by cities and towns under and subject to the provisions of Sections 5(a) and 5(b) of Article XVIII of the Oklahoma Constitution. It is not contended that the franchises involved in the case at bar were issued under or subject to, those provisions of the Constitution. The statement relative to perpetuities in the Okmulgee case must be construed in connection with the principal conclusions running throughout the opinion, to-wit, that Sections 5(a) and 5(b) of Article XVIII provide how a municipal franchise may be created, extended or renewed, and limit the period to twenty-five years. As those sections of the Constitution vested that power in the municipalities, such power could not be exercised by the Legislature, and as the provisions of the Act which was under consideration attempted to take away from the municipalities the power to alter, amend or repeal a franchise, and attempted to deprive the municipalities of the power

to limit the duration to twenty-five years, such Act, as far as the municipalities were concerned, would create a franchise of perpetual duration, as the only authority to repeal was in the Legislature. In other words, the power of altering, renewing and extending such franchises, which the Constitution had vested in the municipalities, and limited to a period of twenty-five years, the Legislature had attempted to usurp, with the result that a municipality which had granted a franchise under authority of the Constitution, was powerless to control its termination, renewal or extension. In the matter of toll bridge franchises, there are no constitutional provisions similar to Sections 5(a) and 5(b) of Article XVIII, and the Legislature has full power to alter, repeal or modify such franchises under Section 47 of Article IX of the Constitution, and the counties have full power to terminate such franchises by purchase or condemnation of the property.

If a thing having perpetual duration should be held to be violative of the rule against perpetuities, the franchises in the instant case are not in conflict with such rule, as they are not of perpetual duration. In *City of Seattle* v. *Columbia, etc., Company*, 6 Wash. 379, 33 Pac. 1048, it was said:

> "A city's franchise to a railroad to run through its streets cannot be void for perpetuity and irrevocableness, since there is always recourse to the power of eminent domain."

Likewise, under authority of Oklahoma City v. Shields, *supra*, the franchises were subject to termination at any time under Section 47 of Article IX of the Constitution, and cannot be said to be of perpetual duration.

If, however, this Court should be of the opinion that the above decisions of the Supreme Court of Oklahoma are applicable to the franchises in the instant case, and that Section 32 of Article II of the Constitution has been construed so as to prohibit the franchises in the instant case, we submit that such decisions are not binding on this Court.

State court decisions, construing state constitutional provisions after contracts had been entered into and rights had accrued thereon, are not binding on Federal courts, and Federal courts assert the right to adopt their own interpretation of the law applicable to the case.

Pease v. *Peck*, 18 How. 595;
Thompson v. *Perrine*, 103 U. S. 806;
Burgess v. *Seligman*, 107 U. S. 20;
Folsom v. *Townsend*, 159 U. S. 611;
Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349;
Moore-Mansfield Construction Co. v. *Electrical Intallation Company*, 234 U. S. 619;
Enfield v. *Jordan*, 119 U. S. 680;
Bolles v. *Brimfield*, 120 U. S. 759;
Barnum v. *Okolona*, 148 U. S. 393;
Mothersead, Bank Commissioner of Oklahoma v. *U. S. F & G. Co.*, 72 Fed. (2d.) 644;

City and County of Denver v. *Denver Tramway Corporation*, 23 Fed. (2d) 287; certiorari denied 278 U. S. 616.

These franchises were granted in 1911. At that time Section 32 of Article II of the Oklahoma Constitution prohibited perpetuities, but there was no definition of the word "perpetuities" contained in the Constitution or Statutes, and it was necessary to look to the general law for such definition. There was no decision of the Supreme Court of Oklahoma on the subject until the decision in *McLaughlin* v. *Yingling*, 90 Okla. 159, 213 Pac. 552, which recognized the common-law definition of perpetuities.

At the time these franchises were granted and at the time of the adoption of the Constitution of Oklahoma, the law was well settled that the rule against perpetuities relates only to the vesting of an estate and not to its duration.

Lewis on Perpetuity, p. 173;
Sanders Essay on Uses and Trusts, p. 196;
Kent's Commentaries on American Law, Vol. 4, p. 267;
Perrin v. *Corey*, 24 How. 231, 235;
Hazen v. *American Security & Trust Company*, 265 Fed. 447;
Pulitzer v. *Livingston*, 89 Me. 359, 36 Atl. 635;
Gray v. *Whittmore*, 192 Mass. 367, 78 N. E. 422;
Closset v. *Burtchaell*, 112 Ore. 585, 230 Pac. 554;
Hawkins v. *Ghent*, 154 Md. 261, 140 Atl. 212;

Ewalt v. *Davenhill*, 257 Pa. 385, 101 Atl. 756;
Phillips v. *Harrow*, 93 Ia. 92, 61 N. W. 434;
Nicol v. *Morton*, 332 Ill. 533, 164 N. E. 5.

The decision in City of Okmulgee v. Okmulgee Gas Company was rendered in 1929, and is therefore not binding on this Court in construing these franchises. We submit that the franchises granted prior to any construction by the Supreme Court of the State, and which are subject to alteration, repeal or modification by the Legislature, and are subject to termination by condemnation proceedings, should not be held to be violative of the rule against perpetuities.

If the franchises were void, there has been no dedication of the toll bridge to the public, and the bridge is private property and cannot be taken for public use without compensation.

Counsel for the petitioners have cited a number of cases which hold that upon the expiration of a toll bridge franchise, the public has the right to use the bridge free of tolls. All of those cases are based on the theory that the owners of the bridge having received a valid franchise and the right to collect tolls for a definite period, are held to have dedicated the bridge as a part of a public highway in consideration of such franchise. In the case at bar, the franchises are either valid grants to Carter and Halsell and their assigns to operate the bridge until such time as the franchises shall be repealed by the Legislature or the property taken by condemnation, or

such franchises were void *ab initio*. If the franchises were void, there was no dedication of the property to the public. There is no statutory dedication in Oklahoma, and if the bridge has been dedicated to the public, it is by reason of an implied dedication in the nature of an estoppel *in pais*.

Cincinnati v. *White*, 6 Pet. 431;
Morgan v. *Railroad Co.*, 96 U. S. 716;
Elliott on Roads and Streets, 3rd Ed., Vol. 1, Sec. 137.

If the franchises were void, it cannot be said that respondents were estopped in equity from asserting their ownership of the property, as the sole consideration moving to them was the granting of the franchises. On the contrary, it is equitable to say that if the franchises were void, there was no dedication and the property belongs to appellants and cannot be taken for public use without compensation. In Postal Bridge Company v. State, *supra*, the court said:

> "It is the contention that the DeLuxe Bridge Company never received any franchise. The franchise is a grant from the State as compensation for the building of the bridge, and, if there was no valid franchise, there could be no valid dedication. Can the State be heard to say, we will permit you to build this bridge on the theory and belief that you have a valid franchise and that you may dedicate it to the public use, and then enjoin the company from collecting tolls. The State has no right to take pri-

vate property for public use without compensation, and a court of equity will never lend its aid to such a proceeding."

See also, *Garvin County* v. *Lindsay Bridge Company*, 32 Okla. 784, 124 Pac. 324.

The suit is not against the State of Oklahoma.

The objection that the suit is against the State of Oklahoma has no application to any of the defendants except the members of the State Highway Commission and the Attorney General. As to the citizens of the State of Oklahoma who will make use of said bridge, and who are represented by the six individual defendants as representative of the class, and as to the county attorneys of the two counties, it is conceded by petitioners that the requisite diversity of citizenship existed, and a suit against them is not a suit against the State.

As to the other defendants, the bill of complaint sought to prevent them from committing unlawful acts against rights and property of the complainants, which said defendants are threatening to commit without right and in excess of their power. As to such defendants the suit was not one against the State. The State of Oklahoma had no pecuniary interest in the suit. The only parties pecuniarily affected are the persons who use the bridge and who are required to pay toll for such use. oNt a dollar will be taken from the treasury of the

State, and no pecuniary obligation to it will be enforced by any decree which may be rendered.

Reagan v. *Farmers Loan & Trust Company*, 154 U. S. 362, 390;
Old Colony Trust Company v. *City of Seattle*, 271 U. S. 426;
Missouri, Kansas & Texas Ry. Co. v. *Missouri Railroad & Warehouse Commissioners*, 183 U. S. 53, 59;
Ex parte Young, 209 U. S. 123;
Prout v. *Starr*, 188 U. S. 537;
Osborne v. *Bank of U. S.*, 9 Wheat. 738;
Allen v. *B. & O. R. R. Co.*, 114 U. S. 270;
Weiland v. *Pioneer Irr. Co.*, 238 Fed. 519;
Magruder v. *Belle-Fourche Valley Waters Users Association*, 219 Fed 72;
Strain v. *U. S. F. & G. Co.*, 292 Fed. 694;
Cline v. *Fink Dairy Co*, 274 U. S. 445;

The case of *In re Ayres*, 123 U. S. 443, is not in conflict with the above case, and does not support the petitioners' contention that the instant suit is one against the State. The distinction is recognized at pages 498-502 of In re Ayres. The wrong complained of and sought to be prevented by the injunction prayed for in the instant case, was the threatened unlawful and wrongful seizure of the property of the respondents. In doing so they were not acting for the State of Oklahoma, as their acts were unauthorized and wrongful and in violation of law. The distinction is further recognized in

Pennoyer v. *McConaughy*, 140 U. S. 1, 10, in which it was said:

> "The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayers*, 123 U. S. 443; *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v *Greenhow*, 107 U. S. 769; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U S. 52.
>
> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State."

In Reagan v. Farmers Loan & Trust Company, *supra*, this Court recognized that wrongful and illegal acts of individuals, threatened and attempted under color of their office, authorized suit against such officers although the unconstitutionality of a state statute was not involved.

The distinction is further recognized in *Ex parte Young*, 209 U. S. 123, 152, in which it was said:

> "The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the Ayers Case, 123 U. S. (*supra*), was to restrain the state officers from commencing suits under the Act of May 12, 1887 (alleged to be unconstitutional), in the name of the State and brought to recover taxes for its use, on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself could not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487). It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property."

The prayer for injunctive relief against the bringing of criminal and civil proceedings was merely incidental to the

primary prayer for injunctive relief against the threatened wrongful seizure of respondents' property and the wrongful invasion of their property rights. The Federal Court having jurisdiction to enjoin the latter was authorized to protect its jurisdiction, to the exclusion of all other courts, until its duty was fully performed. Ex parte Young, *supra,* pp. 161, 162.

We submit that the judgment of the Circuit Court of Appeals of the Tenth Circuit should be affirmed.

Respectfully submitted,

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